

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
WILLOW CREEK BASIN (41N)  
PRELIMINARY DECREE

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CLAIMANT: Montana State Board of Land Commissioners

**CASE: 41N-0413-R-2023**

41N 211723-00

41N 215581-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

All water right claims that appeared in the Preliminary Decree for Willow Creek (Basin 41N) were subject to "issue remarks" resulting from pre-decree examination by the DNRC, objections, and counterobjections.

Claims 41N 211723-00 and 41N 215581-00 were consolidated into Case 41N-0413-R-2022 to resolve the issue remarks.

### FINDINGS OF FACT

1. Claim 41N 211723-00 appeared with the following substantive issue remark:

PURSUANT TO WATER COURT ORDER, IF NO OBJECTIONS TO THIS CLAIM ARE FILED, THE CLAIMED 80.00 ACRE-FEET WILL BE REINSTATED.

Claim 41N 215581-00 appeared with the following substantive issue remarks:

AN AMENDMENT WAS SUBMITTED ON 1/10/2018 REQUESTING TO AMEND THE PLACE OF USE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED BY THE COURT AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A RESERVED RIGHT.

NO PRIORITY DATE WAS CLAIMED

2. On January 1, 2018, Claimant Montana State Board of Land Commissioners/Trust Land Management Division filed a Verified Motion to Amend the priority date to June 30, 1973, and the type of historical right to “use” for claim 41N 215581-00.

3. On January 12, 2023, the Court set a filing deadline for Claimant to file any additional information or evidence needed to resolve the above-listed issue remarks. Nothing was filed by the ordered deadline.

4. Claim 41N 215581-00 was also decreed with a late claim issue remark.

### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

### CONCLUSIONS OF LAW

1. The information in the record is sufficient to resolve the above-listed issue remarks appearing on the claims. Because nothing was filed by the Claimant regarding the volume issue remark appearing on claim 41N 211723-00, the volume of 80.00 acre-feet should be reinstated. Further, Claimant’s *Motion to Amend*, along with the fact that they did not provide additional information or evidence regarding the proposed amendments to the priority date and type of historical right for claim 41N 215581-00, shows by a preponderance that those elements should be amended as described in Finding of Fact No. 2. These amendments resolve the issue remarks, and the issue remarks should be removed from the claim.

2. Claim 41N 215581-00 is a late claim. The late claim issue remark decreed on the claim gave notice that the claim could be subordinate and therefore junior to

certain permits and reservations of water. Any party asserting a superior claim to water based on a permit or reservation was required to file an objection to that late claim during the Basin 41N objection period. Because no such objections were filed, this remark can now be removed from the claim.

### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

### **ELECTRONICALLY SIGNED AND DATED BELOW.**

#### **Service Via Electronic Mail:**

Ben Eckstein  
Montana Attorney General  
Agency Legal Services Bureau  
PO Box 201440  
Helena MT 59620-1440  
(406) 444-5850  
blcwatercourt@mt.gov

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**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WILLOW CREEK  
BASIN 41N**

**Water Right Number:** 41N 211723-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** MONTANA STATE BOARD OF LAND COMMISSIONERS  
TRUST LAND MANAGEMENT DIVISION  
PO BOX 201601  
HELENA, MT 59620 1601

**Priority Date:** DECEMBER 31, 1960

**Type of Historical Right:** USE

**Purpose (use):** FISH AND WILDLIFE

**Flow Rate:**

**Volume:** 80.00 AC-FT

**Source Name:** SIMMONS CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENWNE	3	35N	1E	TOOLE

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DAM

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NENWNE	3	35N	1E	TOOLE

**Diversion to Reservoir:** DIVERSION # 1

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NENWNE	3	35N	1E	TOOLE

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**Remarks:**

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41N 156404-00.

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WILLOW CREEK  
BASIN 41N**

**Water Right Number:** 41N 215581-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE  
**Late Claim:** B

**Owners:** MONTANA STATE BOARD OF LAND COMMISSIONERS  
TRUST LAND MANAGEMENT DIVISION  
PO BOX 201601  
HELENA, MT 59620 1601

**Priority Date:** JUNE 30, 1973  
CLAIM FILED LATE 07/01/1996 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

**Type of Historical Right:** USE

**\*Purpose (use):** IRRIGATION  
**Irrigation Type:** WATER SPREADING

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

**Volume:** 54.00 AC-FT  
**Climatic Area:** 2 - MODERATELY HIGH

**Maximum Acres:** 27.00

**Source Name:** FOURMILE COULEE  
**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESENW	9	35N	2E	TOOLE

**Period of Diversion:** APRIL 1 TO NOVEMBER 30  
**Diversion Means:** DIKE

**Period of Use:** APRIL 1 TO NOVEMBER 30

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.00		SENESE	8	35N	2E	TOOLE
2	11.00		SESE	8	35N	2E	TOOLE
3	2.00		SESWSE	8	35N	2E	TOOLE
4	11.00		N2NWNW	16	35N	2E	TOOLE
<b>Total:</b>	<b>27.00</b>						

**Remarks:**

THE VOLUME WAS AMENDED BY THE CLAIMANT ON 04/21/1997.